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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 301

LOREN J. PIKE, as Supervisor of Inspection, Arizona Fruit and Vegetable Standardization Service,

Appellant,

versus

BRUCE CHURCH, INC., a California corporation,

Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

APPELLANT'S REPLY BRIEF

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Most of the contentions and assertions contained in the appellee's brief have already been covered by our opening brief. This reply brief will be correspondingly limited.

I.

Several assertions advanced by the appellee would appear to question the legitimacy of the basic concept of standardization laws. Notwithstanding these assertions, it is quite clear that the appellee agrees that a state such as Arizona or California, for which the production of fruits and vegetables constitutes an im-

portant industry, has a legitimate interest in prescribing minimum standards of quality and pack for fruits and vegetables shipped from the state.[1]

It is further contended, however, that the Act at issue was "designed fundamentally to serve local economic interests . . ." (Appellee's brief, p. 75), in violation of the principle of *Toomer v. Witsell,* 334 U.S. 385 (1948), *Baldwin v. Seelig,* 294 U.S. 511 (1935), and similar cases.

The fundamental and overriding issue between the two parties has therefore been framed: What is the purpose of the Arizona Fruit and Standardization Law? Is its purpose to promote what the appellee apparently agrees are legitimate interests of the State of Arizona, to enhance the reputation of Arizona produce and enhance the return to Arizona growers? Or is its purpose one which is prohibited by the interstate commerce clause of the United States Constitution, to insulate a segment of Arizona's business from out-of-state competition?

A corollary issue involves the circumstances under which this Court will look behind the stated purpose of state legislation and reassess the factors which the State Legislature took into account. The cases supporting the principle that this Court will not ascribe an improper, invalidating purpose to state legislation so long as there is a reasonable basis for the stated purpose need not be reiterated here. (See pages 34-37 of appellant's opening brief).

Footnote 1

The appellee's brief, for example, contains the following statement at page 43:

> "We do not challenge the right of the State of Arizona to adopt a standardization law for fruits and vegetables or its right to enforce such a law."

Similarly, at the oral argument before the lower court at the preliminary injunction stage, counsel for the appellee stated candidly that "We believe the laws of Arizona in this regard [the standardization laws] are salutary laws." Reporter's Transcript of Proceedings on Plaintiff's Application for Preliminary Injunction, 30/2-3.

The appellee assumes that because the Act at issue has an economic objective, it is *ipso facto* invalid. In this regard, it is necessary to distinguish between the types of economic interests which a state may pursue—consistent with the commerce clause—and those which it may not. It is very clear that a state may not advance the economic interests of its own producers by isolating itself from out-of-state competition. As discussed in our opening brief, this is the principle of the *Baldwin v. Seelig*, *Toomer v. Witsell*, *Johnson v. Haydel*, and similar cases.

Those cases do not hold, however, that all economic objectives are constitutionally out of bounds. *Parker v. Brown*, 317 U.S. 341 (1943), for example, involved a challenge on commerce clause and other grounds to California's Agricultural Prorate Act, which controlled the quantity of raisins shipped from the State of California. This Court stated that "the declared purpose of the act is to 'conserve the agricultural wealth of the state' and 'to prevent economic waste in the marketing of agricultural crops' of the State." 317 U.S. at 346. It is obvious from reading the entire opinion in that case that the purpose of the quantity restrictions was to raise the price which could be realized by California raisin producers. If a state can constitutionally limit quantity of agricultural produce for the purpose of enhancing the return to its producers, quality and packing restrictions for the same purpose are similarly permissible.

The appellee's assertions notwithstanding, the basis for this Court's decision in *Sligh v. Kirkwood*, 237 U.S. 52 (1915), does not rest upon health considerations, but rather upon the economic impact of the challenged law to Florida citrus producers. In the language of this Court:

> The protection of the state's reputation in foreign markets, with the consequent beneficial effect upon a great home industry, may have been within the legislative intent, and it certainly could not be said that this legislation has no reasonable relation to the accomplishment of that purpose. Id. at 61-62.

The appellee correctly observes that Arizona's Fruit and Vegetable Standardization Act contains no express requirement that cantaloupes be packed in the State of Arizona. The reason is obvious. The concern of the Act is that the statutory standards—uniformity of size, absence of deceptive packs, uniformity of varietal characteristics, etc.—must be met. It is only because compliance with these standards can be determined only by inspection in the pack that the issue of where the cantaloupes are packed even arises. The adverse impact on the appellee's business is "incidental, indirect and beyond the purposes of the legislation." *Bayside Fish Flour Co. v. Gentry,* 297 U.S. 422, 426 (1936).

Thus, there is no dispute that the underlying objectives of the Act are economic. But they are not the improper economic objectives which the appellee would ascribe to the Act, objectives such as were involved in *Baldwin v. Seelig* and similar cases. The history of the Act, the undisputed testimony in the instant case (See page 35 of appellant's opening brief) and the holdings of this Court establish the propriety of the stated objectives.[2] Under such circumstances, this Court has made it very clear that it will not impute to the enacting legislature an improper, invalidating objective.

Footnote 2

Ironically, the appellee agrees that "the fact is . . . that the Arizona and California product is considered in the trade of a superior quality to that of the Texas variety. . . ." (Footnote 17, appellee's brief, pp. 79-80) The appellee's further assertion that "there is no indication that the standardization laws are a material factor at all" is of course without any basis. The assertion is opposed to the undisputed testimony of Mr. O. D. Miller and the appellant himself concerning the success which the standardization act has enjoyed, and is further refuted by the fact that a number of federal marketing orders have prescribed standard containers. In any event the fact — with which the appellee agrees — that of the three principal cantaloupe producing states, the two which have standardization acts enjoy the best reputation, certainly strengthens the conclusion that Arizona and California acted within their proper powers in enacting standardization laws.

II.

In further recognition of the propriety of the purposes of Arizona's Fruit and Vegetable Standardization Act, the appellee asserts that Arizona's interests can be vindicated by California inspectors applying California law. It is suggested, for example, that the State of Arizona could "arrange" to have California authorities deliver a certificate "attesting to the fact that the product has been processed and packed in conformity with California requirements." (Appellee's brief, p. 85.) In support of its contention that Arizona is constitutionally required to adopt this "reasonable alternative" the appellee relies upon *Dean Milk Co. v. City of Madison,* 340 U.S. 349 (1951).

In the first place, there is nothing in the existing law of either Arizona or California assuring compliance with such a procedure. As a result, under this "reasonable alternative" Arizona would be dependent upon the day-to-day willingness of California officials to cooperate.

Even more important, packing "in conformity with California requirements" is not what the Arizona statutes require. Once it is recognized that Arizona has a legitimate interest in prescribing minimum standards of quality and pack, it follows ineluctably that Arizona is entitled to enforce its own standards through its own enforcement officers. Additional reasons why enforcement of Arizona's law by California inspectors is not constitutionally required are adequately developed in our opening brief, pages 39 through 43.

Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951), relied upon by the appellee, is instructive. In that case this Court invalidated a city ordinance prohibiting the sale of milk as pasteurized unless it had been processed and bottled at an approved pasteurization plant within a five mile radius from the central square of the City of Madison. The "reasonable and adequate alternative" relied upon by the majority opinion in that case was an inspection by the City's own inspectors of milk pasteurized

outside the statutorily prescribed area. The City could then prohibit any milk not approved by its inspectors from coming into the City. The dispositive difference between the *Dean Milk* case and the instant case is that the "reasonable alternative" in that case permitted the City to rely upon its own inspectors applying the City's own standards. Such a procedure was feasible because non-conforming milk could be prohibited from coming into the City. In the instant case, once the produce leaves the State of Arizona, Arizona's inspectors lose all control over it. Like *Sligh v. Kirkwood,* but unlike *Dean Milk,* this case involves regulation of products going out of the state rather than products coming into the state.

The appellee also suggest another alternative: Those cantaloupes which the shippers desire to ship from this state in closed standard containers approved by the supervisor will conform to the statutory standards. Those which the shipper elects to ship loose and in bulk need not conform. This proposal advocates a return to the same system which existed before enactment of the Standardization Act, a system under which some shippers maintain high standards and some do not. The fact that Bruce Church Inc. asserts that it will maintain the standards is beside the point. The fundamental premise of standardization laws is that the statutory standards are to be enforced as to all produce shpped from the state. Only by this means can the state eradicate the basic evil which led to the enactment of standardization laws.

The parties have stipulated that a fundamental objective of the California and Arizona standardization acts was to prevent deceptive packs. Appendix, pp. 42-43. The appellee has never denied that the prevention of deceptive packs — placing the higher quality fruit on the outstide of the pack so as to misrepresent the entire content of the pack — is a proper state function. It is impossible to perform this function unless the state's inspectors can inspect the pack. Similarly, the appellee's manager of Arizona operations, Mr. Gipe, testified to the importance of sorting for color, varietal characteristics, etc., Gipe Deposition 55/25-56/24.

His testimony bears out the fact that it is important to the reputaton of cantaloupes that all cantaloupes wihin a given pack be of similar color and varieal characteristics. It is impossible to assure that this will be done unless the state is permitted to inspect the packed produce.

III.

The appellee's pre-emption argument was not treated by our opening brief because it was not raised by the appellee's motion to dismiss. In any event, however, the argument is not well taken. *Florida Lime and Avocado Growers, Inc., v. Paul,* 373 U.S. 132 (1963), and *Parker v. Brown,* 317 U.S. 341 (1943).

The dispositive fact, pertinent to the pre-emption issue, is that there is no marketing order governing cantaloupes in Arizona. Under this Court's decision in *Florida Lime and Avocado Growers, Inc., v. Paul,* the presence of a marketing order does not necessarily pre-empt the state regulation; the issue is whether the federal regulation has in fact manifest an intent to occupy the field. The issue in the *Paul* case is not even present in the instant case, however, because there is no markting order for cantaloupes in Arizona.

In rejecting the contention in *Parker v. Brown,* 317 U.S. 341 (1943), that the Agricultural Adjustment Act itself was sufficient to pre-empt the field, this Court stated as follows:

> It is evident, therefore, that the Marketing Act contemplates the existence of state programs at least until such time as the Secretary shall establish a federal marketing program, unless the state program in some way conflicts with the policy of the federal act. The Act contemplates that each sovereign shall operate 'in its own sphere but can exert its authority in conformity rather than in conflict with that of the other.' 317 U.S. at 341.

The Appellee has pointed to no provisions in any federal acts which are inconsistent with Arizona's Fruit and Vegetable Standardization Act, and we know of none.

Without question, the Secretary of Agriculture could, pursuant to the terms of the Agricultural Adjustment Act, promulgate a marketing order or marketing orders which would control the shipment of loose cantaloupes across state lines, thus superseding Arizona law in this regard. The fact of the matter is, however, that the Secretary has not issued such an order. Arizona is, therefore, entitled to enforce its own law through its own enforcement officers.

IV.

Finally, the appellee's brief contains a number of statements which are either misleading or erroneous. While most of these assertions are of tangential relevance at best, correction of some is warranted in order to set the case in proper perspective.

A. If the appellee means to imply that Mr. Pike issued his order as a result of action taken by the Arizona Vegetable Growers Association, the implication is not supported by the record and is flatly false. The record shows that Mr. Pike attended a meeting of the Board of Directors of the Arizona Vegetable Growers Association at which two bills were discussed, one of them involving "the bulk movement out of the state of vegetables and melons." (Appendix, p. 49). The controverted order, however, did not issue following Mr. Pike's attendance at that meeting, but rather following the final defeat of the bill which, in the language of Mr. Gipe, manager of appellee's Arizona operation "would have allowed, with the supervisor of inspection's approval, the transporting of vegetables and melons to any point 25 miles from the state line for packing, shipment and interstate commerce." Gipe deposition 22/6-10. Mr. Pike stated that "when they have tried to get this bill through the Arizona Legislature and the Legislature wouldn't pass it, I could see no other alternative for me only to enforce the law." Pike deposition 56/10-13. Accordingly, he sent the letter to which the appellee objects.

B. The appellee's brief asserts at several points that the appellant, Mr. Pike, stated at his deposition that the state would suffer

no harm if the appellee's cantaloupes were shipped loose into the State of California. Mr. Pike's statement in fact was that "I wouldn't [suffer any detriment] as long as it's under a court order." (Pike Deposition 59/19-20) The total context of the statement reveals clearly that what he meant was that he personally would not suffer any detriment. The immediately preceding question, for example, was "Would you suffer any detriment?" (*Id.* at 59/17-18)

C. The complete failure to enforce, extending over a period of more than fifty years, in *Lassen v. Arizona,* 385 U.S. 458 (1967), was not a failure by the State of Arizona, as contended by the appellee, but rather by the United States Department of Justice, which had no interest in the controversy in that case. Enforcement of the public lands provisions of the Arizona Enabling Act is vested by that Act in the United States Attorney General. *Arizona Enabling Act,* Section 28, Act of June 20, 1910, c. 310, 36 U.S. Stat. 577, 568-579. The appellee's attempted distinction of the case on the basis that the enforcement failure was self-serving is therefore incorrect.

D. The appellee's reference to federal inspection is misleading. There is no marketing order applicable to cantaloupes within the State of Arizona, and the only federal inspection which occurs is for the purpose of grading. Federal inspection for grading purposes occurs only upon request by the shippers and the cost of the inspection is paid by the shipper requesting the inspection. The federal inspectors have no powers to prohibit shipment of produce which does not meet minimum standards. See 7 C.F.R., Part 51.

E. The only cantaloupes whose movement in interstate commerce is prohibited by the Act are those cantaloupes which do not meet the standards prescribed by the Act. This fundamental principle is completely overlooked by the appellee's repeated assertions that the Act interdicts interstate movement. From the propriety of a state's interest in prescribing standards, it neces-

sarily follows that some cantaloupes will not meet those standards, and consequently cannot be shipped. Enforcement would be meaningless if the shipper were vested with the prerogative to decide for himself which produce would be shipped. There is no meaningful difference in this regard between fruit and vegetable standardization inspection and inspection related to such matters as pickle worm prevention or inspections such as were involved in *Sligh v. Kirkwood.* As to all such matters, if the shipper refuses to comply with the State requirements, the State has no alternative except to prohibit shipment of his produce until it has been inspected and a determination made as to which produce complies with the statutory standards, and which does not. Surely the appellee would not contend that it would be entitled to ship its produce in spite of its refusal to submit to a pickle worm inspection. Analytically, the only difference between the two inspections is that one requires additional expenditures by the appellee as a result of appellee's inability to pack except in a packing shed. As developed in our opening brief, additional cost to a profit making corporation is not a sufficient basis to invalidate state legislation on commerce clause grounds.

CONCLUSION

We submit that the legitimacy of Arizona's interest in prescribing standards of quality and pack for produce shipped from this state is beyond question. Even the appellee agrees "that the laws of Arizona in this regard are salutary laws." Reporter's Transcript of Proceedings on Plaintiff's Application for Preliminary Injunction, 30/2-3.

The controlling issue, therefore, is whether this Court will hold that the actual objectives of Arizona's Standardization Law are not the stated objectives, but rather are objectives which will make the act unconstitutional.

This Court has made it very clear in a wealth of decisions, some of which are discussed at pages 34-37 of our opening brief, that "a legislative judgment . . . is presumed to be supported by facts known to the Legislature unless facts judicially known or proved preclude that possibility." *South Carolina v. Barnwell Bros.,* 303 U.S. 177, 191 (1938). Consistent with this principle, improper, invalidating purposes were found in *Johnson v. Haydel,* 278 U.S. 16 (1928) and *Toomer v. Witsell,* 334 U.S. 385 (1948) solely because there was no other possible purpose.

From this Court's decisions in *Sligh v. Kirkwood,* 237 U.S. 52 (1915) and *Pacific States Box & Basket Co. v. White,* 296 U.S. 176 (1935), it follows necessarily that the State of Arizona has pursued a proper objective in enacting its Fruit and Vegetable Standardization Act. Conformity with some of the most important provisions of that Act—among them, the avoidance of deceptive packs, requirements of uniformity of color and varietal characteristics, and the requirement that the State of Arizona be given credit for produce packed under the demanding standards of its Standardization Act by identifying the farm or orchard of origin—can only be enforced by an inspection in the pack. The impact upon the appellee's business, and the impact upon interstate commerce, if any, is "incidental, indirect, and beyond the

purposes of the legislation." *Bayside Fish Flour Co. v. Gentry*, 297 U.S. 422, 426 (1936).

It is respectfully submitted that the judgment of the lower court should be reversed.

Respectfully submitted,

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